CLERK'S COPY.

Supreme Court of the United States

OCTOBER TERM, 1935

No. 403

GEORGE ASHWANDER ET AL., PETITIONERS,

vs.

TENNESSEE VALLEY AUTHORITY ET AL.

No. 404

GEORGE ASHWANDER ET AL., PETITIONERS,

vs.

TENNESSEE VALLEY AUTHORITY ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 26, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

TRANSCRIPT OF RECORD

UNITED STATES CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT

No. .....

GEORGE ASHWANDER, et al.
Cross Appellants and Appellees,

vs.

Tennessee Valley Authority, Electric Home & Farm Authority, Inc., Arthur E. Morgan, Harcourt A. Morgan, David E. Lilienthal and City of Florence, Alabama, a Municipal Corporation.
Cross Appellees and Appellants,
and
Alabama Power Company, Chemical Bank & Trust Company, and City of Tuscumbia, City of Sheffield, City of Decatur, City of Russellville, City of Athens, Towns of Ardmore, Austinville, Cherokee, Courtland, Elkmont, Falkville, Huntsville, Leighton, Moulton, Red Bay, Rogersville, and Town Creek, all Municipal Corporations of the State of Alabama, *Appellees.*

CABANISS & JOHNSTON,
FORNEY JOHNSTON AND
JOS. F. JOHNSTON, *Attorneys for Ashwander, et al., Cross Appellants.*

JAMES LAWRENCE FLY, AND
WILLIAM C. FITTS, JR.,
Attorneys for Tennessee Valley Authority, Electric Home and Farm Authority, Arthur E. Morgan, Harcourt A. Morgan, and David E. Lilienthal, Cross Appellees.

WILLIAM H. MITCHELL, *Attorney for City of Florence, Cross Appellee.*

MARTIN, TURNER AND MCWHORTER, *Attorneys for Alabama Power Company, Appellee.*

COURTLAND PALMER AND J. T. STOKELY,
Attorneys for Chemical Bank & Trust Co., Appellee.

JOHN E. DELONY, JR., *Attorney for City of Tuscumbia, Appellee.*

STOCKTON COOKE, JR., *Attorney for City of Sheffield, Appellee.*

STOCKTON COOKE, JR., AND E. DELONY, JR., *Attorneys for City of Decatur, City of Russellville, Towns of Ardmore, Austinville, Cherokee, Courtland, Elkmont, Falkville, Hartselle, Leighton, Moulton, Red Bay, Rogersville, and Town Creek. Appellees.*

EDWARD GOODRICH, *Attorney for City of Athens, Alabama, Appellee.*

INDEX

Page

For all other Proceedings in this Case, see Volumes I and II, Filed herein under Docket No. 7764, United States Circuit Court of Appeals, and re-certified herewith....1-1277

Amended and Supplemental Bill of Complaint....1278

Sundry Aspects of Case Constitute Actual Controversy within Meaning of Declaratory Judgment Act....1278-80

Multiplicity of Suits Threatened....1281

Irreparable Injury Threatened....1282

Amendment of Prayer....1283

Motion of TVA for Interpretation of Final Decree with Reference to Extension of Lines....1289

Order on Foregoing Motion....1292

Petition for Appeal....1293

Order Allowing Appeal....1294

Assignment of Errors by cross Appellants (Plaintiffs)....1295

Praecipe of Plaintiffs for Supplemental Record....1299

Clerk's Certificate....1301

roceedings in U. S. C. C. A., Fifth Circuit.... 1302

linute entry of argument and submission.... 1302

pinion, Bryan, J.... 1302

oncurring opinion, Sibley, J.... 1310

udgment.... 1311

lotion for stay of mandate.... 1312

rder staying issuance of mandate.... 1313

lerk's certificate.... 1314

rders allowing certiorari.... 1315

AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT

Filed January 2, 1935

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHEASTERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

GEORGE ASHWANDER, ET AL,

Plaintiffs,

vs.

TENNESSEE VALLEY AUTHORITY, ET AL,

Defendants.

No. 355
In Equity

Come the plaintiffs and file this amended and supplemental bill of complaint, and to that end, refer to and adopt all of the averments of the original bill of complaint and amend and supplement the same by the additional averments hereinafter set out, to be designated as Sections (51) to (74), both inclusive, and also by amending the prayer of the bill of complaint as set out below, viz:

(Sections (51) through (68) inclusive not included in praecipe.)

(69) Plaintiffs aver that this is a case of actual controversy within the meaning of Act Public No.

343, 73d Congress, approved June 14, 1934, authorizing courts of the United States upon petition, declaration, complaint or other appropriate pleading, to declare rights and other legal relations of any interested party whether or not further relief is or could be prayed, such declaration to have the force and effect of a final judgment or decree, and that plaintiffs are entitled in the right of Alabama Power Company to a declaratory decree in respect to the several contracts and matters averred and complained of in this suit in addition to injunctive relief as prayed.

Plaintiffs attach hereto, marked Exhibit No. 18 and made a part hereof, copy of a letter dated December 12, 1934, on behalf of the TVA to the City of Decatur purporting to express the attitude of TVA as to the contract of August 9th, asserting that the "contract is still in effect," but withholding any statement as to the purpose or intention of TVA with reference to the alleged or implied default by the Power Company; and plaintiffs aver that TVA is, for its objectives herein stated and in furtherance of its program, creating and using to its own advantage the resulting confusion about the matter, as a further act of coercion upon the Power Company.

Plaintiffs aver that the status and relationship of the defendant Power Company under the alleged contracts of January 4 and August 9, 1934, the claims and attitude of TVA with reference thereto, the question whether and to what extent the same are claimed to be in force and to what extent, if any, they con-

stitute liens upon the lands and properties of the Power Company; the right of TVA to engage in proprietary generation of power "to avoid economic waste" for sale in competition with Alabama Power Company within the area of public service covered by its certificates of public convenience and necessity and by its licenses from Federal Power Commission, the right of TVA to engage in proprietary or "yardstick" transmission or distribution of powers so generated; the right of the defendant municipalities in aid or furtherance of the TVA program to purchase power so generated and distributed, in competition with Alabama Power Company, and to accept and expend federal funds from PWA or TVA in furtherance of power contracts with TVA and in furtherance of its plan of proprietary generation, transmission and distribution, also in competition with Alabama Power Company; all constitute actual controversies under and arising out of the facts herein averred, within the meaning of said Act Public No. 343 and are necessary to be determined to award complete relief and avoid a multiplicity of suits.

(70) Plaintiffs aver that they have no adequate remedy at law or other than in a court of equity.

(71) Since the filing of this bill of complaint over one thousand holders of the preferred stock of the defendant Power Company, holding over 25,000 shares, have formally approved of this suit and have authorized that they be made formal parties if deemed helpful, and plaintiffs offer to make them parties plaintiff

to this suit should such action be required or deemed appropriate by this Court.

(72) Unless the relief herein prayed is accorded, an indefinite multiplicity of suits will be required to enjoin and restrain the TVA from its threatened illegal extension of utility transmission and distribution systems in competition with the defendant Alabama Power Company and to restrain the defendant municipalities from making use of PWA funds and purchasing illegally distributed power to compete with the Power Company.

The necessity for such suits will necessarily involve the defendant Power Company and/or the stockholders represented by plaintiff in successive actions both against the TVA, as each competitive utility extension is announced, and/or against the municipal defendants in this proceeding and other municipalities now served by Alabama Power Company which the said TVA might from time to time in the prosecution of its program make use of as aforesaid. Common and decisive questions of law and fact are involved in each proposed loan and in each city gate contract with TVA and said TVA and its managers and all of the defendant municipalities have a common interest in the questions of law and of fact involved, all of the defendants being involved in the scheme or plan to have TVA engage illegally in the proprietary business of transmitting and selling power and all of the proposed PWA loans being based on TVA city gate contracts as a source of supply.

(73) Unless immediately brought within the scope and lis pendens of this suit, the defendant Power Company is not only threatened with the closing of such PWA loans and grants and with contracts for construction of competitive systems with the proceeds, with vexatious questions of laches and estoppel if it delays action and if it does not assert peremptory action to terminate said agreements of January 4 and August 9, 1934, as well as with great uncertainty as to its rights and status and confusion of remedies under the circumstances averred herein; and with the practical certainty of great or indefinite delay in bringing said related matters to issue, which will, of itself alone, result in grave and irreparable damage to the rights, business and property of Alabama Power Company.

In view of the national popular resentment aroused by TVA and associated federal agencies against the utility companies and Alabama Power Company in carrying forward its illegal objective, there is a grave probability of adverse legislative action both in the State and in Congress unless this controversy is heard promptly and the grave legalities involved are judicially determined. The protection of the Power Company, to be effective and adequate, must be prompt.

(74) Copy of this bill of complaint has been served upon the management of Alabama Power Company and of Commonwealth & Southern Corporation, with request that the Alabama Power Company take ac-

tion in its own name to redress and remedy the wrongs done and threatened, herein complained of; said request has been declined and further effort to that end would be futile or by delay would gravely jeopardize the relief, which is emergent and imperative, prayed herein.

AMENDMENT OF PRAYER

Plaintiffs amend the prayer of their original bill of complaint by adding at the end of sub-division VII of said prayer, immediately before the prayer for general relief, the following:

VIII.

Plaintiffs further pray that this bill of complaint as amended be received and entertained as a petition for a declaratory decree within the purview of Act Public No. 343, 73d Congress, approved June 14, 1934, amending the Judicial Code by adding Section 274D and that in accordance therewith this Court by final decree herein declare the rights and relations of plaintiffs, suing in the right of the defendant Alabama Power Company, in respect to the several contracts, matters and things in respect of which injunctive relief is prayed herein and, in particular, declaring the right or authority of Tennessee Valley Authority under the Tennessee Valley Authority Act and under the Constitution of the United States and

under the rules of law relating to the action of administrative tribunals

(1) to engage in the utility business in competition with Alabama Power Company;

(2) to acquire and operate transmission lines in competition with Alabama Power Company;

(3) to acquire and operate distribution systems in competition with Alabama Power Company;

(4) to acquire and operate public utility systems in the area now served by Alabama Power Company and within the scope of its certificates of public convenience and necessity and licenses from Federal Power Commission;

(5) to conduct and carry on a program of promoting public ownership of utilities as complained of in the bill of complaint within the area served by Alabama Power Company and to finance the same for acquisition by municipalities;

(6) to make use of federal funds in purchasing utility distribution systems for use in competition with Alabama Power Company;

(7) to enter into contracts with municipalities for sale of power subjecting the resale rates to the control of the Tennessee Valley Authority, in competition with Alabama Power Company;

(8) to enter into city gate contracts with municipalities for the supply of electricity in the area served by Alabama Power Company where the effect of such contracts is in furtherance of the proprietary business of transmission or distribution by TVA;

(9) to generate surplus power at dams or plants in excess of any amount required for federal purposes for the purpose of selling same "to avoid economic waste" or in order not to deprive the public of "an opportunity to use the potential electric power to advantage" or to reimburse the government for the cost of the dam or in aid of "yardstick" operations or for any other non-federal purpose, where such power is to be sold or distributed in competition with Alabama Power Company;

(10) to make use of the surplus waters of the Tennessee River not required for regulation of navigation in the proprietary business of generating power for sale for a profit, in competition with Alabama Power Company;

(11) to generate hydro-electric power greatly in excess of any possible use for any federal purpose for the purpose of selling same in competition with Alabama Power Company;

(12) to sell or distribute power as a part of the national Administration's plan to use the power generated on the Tennessee and to use Public Works loans and grants in furtherance of rate reduction by threat of municipal duplication and competition with the aid of federal loans and grants.

(13) And plaintiffs pray that the Court render such other declaratory decrees as may on final hearing be appropriate to the granting of full relief to plaintiffs.

IX.

Plaintiffs further amend the prayer of the original bill of complaint by the addition of the following paragraphs:

Plaintiffs further pray that a restraining order and temporary injunction issue herein (and that upon final hearing the same be made final and perpetual)

(a) Enjoining the defendant municipalities from aiding, furthering or participating in the illegal use or diversion of federal funds by accepting a loan or grant thereof from Public Works Administration or Tennessee Valley Authority for the construction or acquisition of an electric utility system in competition with Alabama Power Company.

(b) Enjoining the defendant municipalities from aiding, furthering or participating in the illegal proprietary operation by TVA of the business of generating, transmitting and/or distributing power by purchasing power from TVA, in competition with Alabama Power Company.

(c) Enjoining the defendant municipalities and each of them from entering into or performing any contract with Public Works Administration or any other agent or agency of the United States for a loan or grant of federal funds to such municipality for construction of an electric utility distribution system to be supplied by electric power transmitted or sold by or for account of Tennessee Valley Authority, and from accepting or using any such loan or grant or is-

suing any obligation to any such agency in consideration for any such loan or grant; and in particular, from entering into or performing or accepting a loan or grant under any such agreement and issuing or assuming any such obligation as is set forth or referred to in the form of contract attached hereto marked Exhibit No. 14, in aid or furtherance of competition with Alabama Power Company.

(d) Enjoining the defendant municipalities from entering into or performing any contract with TVA proposed by it in furtherance of its plan to engage in proprietary transmission or distribution of power in competition with Alabama Power Company.

Plaintiffs further pray that all such contracts between the defendant municipalities and the United States (PWA loan and grant agreements) and all such agreements with TVA (city gate power agreements) be declared illegal in so far as they are proposed to be used in and about the construction or operation of an electric distribution system in competition with Alabama Power Company.

Plaintiffs further pray that upon final hearing Tennessee Valley Authority be enjoined from the proprietary sale of power, wherever generated, in the State of Alabama within the utility service area of Alabama Power Company or within the area covered by the licenses of Federal Power Commission, to be used or resold in competition with Alabama Power Company.

Plaintiffs pray for such other or different relief as may be meet and proper.

Each and all of the defendants are required to answer the bill of complaint as amended and supplemented hereby, but not under oath, answer under oath being waived.

Respectfully submitted,

CABANISS & JOHNSTON,
Solicitors for Plaintiffs.

State of Alabama,
Jefferson County.

Before me, the undersigned authority in and for said State and County, personally appeared Al C. Garber, who, being by me first duly sworn, deposes and says that he is one of the plaintiffs in the foregoing cause, that he has read the foregoing amendment to the original bill of complaint, and that the facts stated in said amendment are true as therein averred, and that where averred upon information and belief, affiant is informed thereof, and verily believes the same to be true.

AL C. GARBER.

Sworn to and subscribed before me, this 22nd day of December, 1934.

L. J. CARAU,
Notary Public.

MOTION OF TVA FOR INTERPRETATION OF FINAL DECREE

(Title Omitted)

Filed April 26, 1935

Pursuant to the provisions of the Final Decree entered on the 2nd day of March, 1935, now comes the defendant, Tennessee Valley Authority, and moves the Court to construe and interpret the said decree to the effect that it does not prohibit the building of the following described rural lines:

The project shown upon the print labelled SW-309, which is attached hereto as Exhibit 1 of this motion. As shown by that print, the present transmission line owned by the Tennessee Valley Authority extends from Wilson Dam along the Tuscumbia-Russellville Highway to the town of Littleville. The proposed extension is to start at a point on this line approximately one-half mile South of the city of Tuscumbia, extending westward a distance of approximately eight miles to the town of Pride, and in a southwesterly direction approximately seven miles along the Frankfort Highway toward the village of Crooked Oak. The energy to be transmitted over this extension is to be supplied directly from Wilson Dam and no intertie or interchange arrangement with the Alabama Power Company is contemplated. This proposed construction has no relationship to the matters and things included in the Contract of January 4, 1934 between the Ala-

bama Power Company and this defendant, and is not within the terms of the Final Decree herein.

The proposed extension shown upon the print labelled SW-311, which is attached hereto as Exhibit 2 to this motion, which is to be a feedeer-line extending direct from the Wilson Dam Reservation for a distance of approximately one mile in a northerly direction to the junction of Middle Road and the Lee Highway, between the cities of Florence and Rogersville, Alabama. The energy to be transmitted over this line will be supplied from the Wilson Dam power house and no interchange or intertie arrangement will be necessary. This proposed construction is in no way related to the matters and things included in the Contract of January 4, 1934, between the Alabama Power Company and this defendant and it is not within the terms of the Final Decree herein.

In accordance with the terms of the Final Decree, the defendant on, to-wit, the 17th day of April, 1935, served written notice upon the Alabama Power Company and Forney Johnston, Esq., Solicitor of Record for the plaintiffs, of the intention to construct the above described lines. A copy of said written notice is attached hereto as Exhibit 3 to this motion.

On, to-wit, the 19th day of April, 1935, the Alabama Power Company served notice of its objection to the proposed construction, a copy of which is attached hereto as Exhibit 4 to this motion.

WHEREFORE, the defendant prays that this Court will enter an order construing and interpreting the Final Decree in this cause as not prohibiting the extension of lines as herein described.

JAMES LAWRENCE FLY,
WILLIAM C. FITTS, JR.,
Solicitors for Defendant, Tennessee Valley Authority.

State of Tennessee,
County of Knox.

Before me, the undersigned authority in and for said county in said state, personally appeared Llewellyn Evans, who being by me first duly sworn, did depose and say that he is Chief Electrical Engineer of the Tennessee Valley Authority, and as such has knowledge of the facts stated in the foregoing motion and that the statement of facts contained therein is true and correct.

LLEWELLYN EVANS.

Subscribed and sworn to before me this 22nd day of April, 1935.

L. B. BOLT, JR.,
Notary Public.
My Com. Ex. Oct. 7, 1936.

Motion granted in part and denied in part, each party excepting to the decree.

W. I. GRUBB,
District Judge.

The Exhibits attached to the foregoing motion were omitted from the praecipe.

ORDER

(Title Omitted)

Filed April 26, 1935

This case having come on for hearing and final argument on the 26th day of April, 1935, on the motion of defendant, Tennessee Valley Authority, for interpretation of the final decree to the effect that it does not prohibit the building of certain rural transmission lines, more particularly described in the said motion and exhibits thereto attached, and the Court having set this matter down for hearing and argument, and all parties having duly appeared by counsel, and the Court, after reading and filing the motion and papers in support thereof, and after reading and filing the affidavit of J. T. Jackson, District Engineer of the Alabama Power Company, in opposition thereto, and the Court having heard the oral testimony on the subject matter of the motion and after due consideration, the Court hereby ORDERS, ADJUDGES AND DECREES as follows:

The said motion is hereby denied, except as to the construction of the proposed extension shown on the print labeled "SW-311," which is Exhibit 2 to the said motion, which line extends from the Wilson Dam Reservation for a distance of approximately 1 mile in a Northerly direction to the junction of Middle Road and the Lee Highway, as to which the motion is hereby granted; provided, however, that the use of said line shall be in accordance with the terms of the

final decree herein, for the purpose of transmitting energy to serve the requirements of customers already being served by the Tennessee Valley Authority, and for th purpose of eliminating the interchange point at the junction of Middle Road and Lee Highway, and it is ORDERED AND DECREED that defendant, Tennessee Valley Authority, shall not utilize the said proposed line in aid of the further extension of service into additional points in the territory proposed to be ceded by the Alabama Power Company to the Tennessee Valley Authority by the contract of January 4, 1934, during the time said territorial agreement in said contract remains outstanding and the final decree in this case remains in effect.

To the entry of all of the foregoing, each of the parties duly excepted.

W. I. GRUBB,
United States District Judge.

Birmingham, Alabama, April 26, 1935.

PETITION FOR APPEAL

(Title Omitted)

Filed June 1, 1935

Now come George Ashwander, Wm. M. Browder, A. C. Garber, Joseph R. Cook, Jr., Bessie M. Gray, C. H. Gray, Clifford L. Lamar, Mary P. London, F. W. Murray, Eugene C. Morgan, Joseph A. Norman, C. L. Torbert, R. H. Woodrow, Tutwiler Investment Company, a Corporation, plaintiffs in the above styled cause, and conceiving that in the decree entered

and filed in the above styled cause on, to-wit, March 2, 1935, error was committed in the respects stated in the assignment of errors presented and filed with this petition, hereby petition the Court for an order allowing the plaintiffs to prosecute an appeal to the United States Circuit Court of Appeals for the Fifth Circuit; and also that an order may be made fixing the amount of security which plaintiffs shall give and furnish upon said appeal for the costs of appeal.

CABANISS & JOHNSTON,
Attorneys for Plaintiffs.

Presented, this 1st day of June, 1935.

W. I. GRUBB,
U. S. District Judge.

ORDER ALLOWING APPEAL

(Title Omitted)

Filed June 1, 1935

The petition of George Ashwander, et al, plaintiffs in the above styled cause, for an appeal from the decree entered herein on March 2, 1935, this day presented, is hereby granted as prayed, and the appeal is allowed upon petitioners filing bond in the sum of Five Hundred ($500.00) Dollars to secure the costs of such appeal, with sufficient sureties and conditioned as required by law.

This 1st day of June, 1935.

W. I. GRUBB,
U. S. District Judge.

ASSIGNMENT OF ERRORS

(Title Omitted)

Filed June 1, 1935

The plaintiffs in the above styled cause, in connection with their petition for an order allowing an appeal, make the following assignment of errors, separately and severally, upon which they will rely in the prosecution of their appeal in said cause from the decree entered on March 2, 1935, to-wit:

(1) The said decree of March 2, 1935, failed to grant to plaintiffs the relief to which they were entitled under Act Public No. 343, 73rd Congress, approved June 14, 1934, authorizing courts of the United States to declare rights and other legal relations of any interested party, such declaration to have the force and effect of a final judgment or decree.

(2) Said decree of March 2, 1935, failed to declare the right or authority of the Tennessee Valley Authority, under the Constitution of the United States and under the Tennessee Valley Authority Act, and under the rules of law relating to the action of administrative tribunals, separately and respectively,

a. to engage in the utility business in competition with Alabama Power Company;

b. to construct or acquire and operate transmission lines in competition with Alabama Power Company;

c. to construct or acquire and operate distribution systems in competition with Alabama Power Company;

d. to engage in proprietary manufacture and sale of electricity in competition with Alabama Power Company;

e. to conduct and carry on a program of promoting public ownership of competitive utilities as complained of in the bill of complaint within the area served by Alabama Power Company and to finance the same for acquisition by municipalities;

f. to make use of federal funds in purchasing utility distribution systems for use in competition with Alabama Power Company;

g. to enter into contracts with municipalities for sale of power subjecting the resale rates to the control of the Tennessee Valley Authority, in competition with Alabama Power Company;

h. to enter into city gate contracts with municipalities for the supply of electricity to be distributed in the area served by Alabama Power Company where the effect of such contracts is in furtherance of the proprietary business of transmission or distribution by Tennessee Valley Authority;

i. to manufacture electric power at dams or plants in known and intentional excess of any amount currently required for federal purposes for the purpose of selling same in proprietary business in competition with Alabama Power Company;

j. to make use of the waters of the Tennessee River not required for regulation of navigation in the proprietary business of manufacturing power for sale

for a profit, in competition with Alabama Power Company, either at the steam plant or dam or after transmission and/or distribution by Tennessee Valley Authority.

(3) Said decree of March 2, 1935, failed to declare the right or authority of the respective municipal defendants to obtain loans or grants from the federal government to enable them to enter into utility competition with Alabama Power Company, whether with power to be purchased from TVA or not.

(4) Said decree of March 2, 1935, was further erroneous in that it failed

a. to enjoin and restrain the Tennessee Valley Authority from proprietary manufacturing of power in intentional excess of power required for governmental use and marketing the same in competition with Alabama Power Company, either at the steam plant or dam or after transmission or distribution by Tennessee Valley Authority;

b. to enjoin the respective defendant municipalities and each of them from entering into or performing any contract with Public Works Administration or any other agent or agency of the United States for a loan or grant of federal funds to such municipalities for construction of electric utility distribution systems to be operated in competition with Alabama Power Company, and from accepting or using any such loan or grant of federal funds or issuing any obligation to any such agency in consideration for any such loan or grant, and in particular, from accepting or using

a loan or grant under any such agreement and issuing or assuming any such obligation as is set forth or referred to in the form of contract between the Public Works Administration and the City of Florence (Plaintiffs' Exhibit No. 25);

c. enjoin and restrain Tennessee Valley Authority from the proprietary sale of power, whever generated and howsoever acquired, in the State of Alabama within the utility service area of the Alabama Power Company or within the area of service contemplated by the franchises and permits held by the Alabama Power Company or licenses issued by Federal Power Commission, in competition with or to be used or re-sold in competition with Alabama Power Company

(5) Said decree of March 2, 1935, failed to give affirmative or declaratory effect to the separate and several conclusions of law announced by the court as made and entered by the court herein pursuant to Equity Rule 70½.

WHEREFORE, plaintiffs pray that the final decree herein be corrected and extended, and as so corrected and extended, affirmed, or that such order be entered as may be necessary to give effect to the additional relief herein insisted upon.

CABANISS & JOHNSTON,
Attorneys for Plaintiffs.

PRAECIPE

(Title Omitted)

Filed June 1, 1935

To the Clerk of the United States District Court for the Northeastern Division of the Northern District of Alabama:

You are hereby requested to prepare and certify to the United States Circuit Court of Appeals, in connection with the appeal in the above styled cause by George Ashwander, et al, all such papers, files and proceedings as are necessary to a determination of the cause in the appellate court, including the following pleadings and proceedings, in addition to those heretofore certified by you pursuant to the appeals in said cause by the defendants Tennessee Valley Authority et al, and the defendant City of Florence, Alabama:

1. The Amended and Supplemental Bill of Complain filed herein on January 2, 1935, omitting from the same, however, Sections (51) through (68), both inclusive, stating in lieu thereof (Sections 51 through 68 not included in praecipe), and omitting the Exhibits thereto.

2. The motion for Interpretation of Final Decree filed herein by defendant Tennessee Valley Authority on April 26, 1935, omitting the exhibits attached

thereto, stating in lieu thereof (Exhibits not included in praecipe).

3. The Court's order of April 26, 1935.

4. Petition for appeal by the plaintiffs.

5. Order allowing appeal to plaintiffs.

6. The assignment of errors this day filed by plaintiffs.

7. The citation.

8. A copy of this praecipe.

9. The certificate of the Clerk of this Court to the transcript.

You may omit all other papers and documents.

CABANISS & JOHNSTON,

Solicitors for plaintiffs George Ashwander et al.

CLERK'S CERTIFICATE

I, W. S. Lovell, Clerk of the District Court of the United States in and for the Northern District of Alabama, do hereby certify that the pages numbered from 1 to 1277, both inclusive, heretofore certified in the matter of the appeal of the Tennessee Valley Authority, et al, appellants, vs. George Ashwander, et al, appellees, in that certain cause pending in the United States Circuit Court of Appeals, Fifth Circuit, of which an exact copy further certified under this date is attached or lodged herewith, together with the foregoing pages numbered from 1278 to 1301, both inclusive, is a full, true and correct transcript of the record on cross appeal in the matter of George Ashwander, et al, cross appellants vs. Tennessee Valley Authority, et al, as fully as the same appears of record and on file in my office.

In testimony Whereof I have hereunto set my hand and affixed my seal, all on this ..... day of June, 1935.

.....,

Clerk of the District Court of the United States for the Northern District of Alabama.

[fol. 1305] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of June 17th, 1935

No. 7764

TENNESSEE VALLEY AUTHORITY et al.
versus
GEORGE ASHWANDER et al.

No. 7812

GEORGE ASHWANDER et al.
versus
TENNESSEE VALLEY AUTHORITY et al.

On this day these causes were called, and, after argument by Forney Johnston, Esq., for appellees and cross-appellants, and James Lawrence Fly, Esq., John Lord O'Brian, Esq., and Wm. H. Mitchell, Esq., for appellants and cross-appellees, were submitted to the Court.

[fol. 1306] OPINION OF THE COURT—Filed July 17th, 1935

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7764

TENNESSEE VALLEY AUTHORITY et al., Appellants,
versus
GEORGE ASHWANDER et al., Appellees

No. 7812

GEORGE ASHWANDER et al., Cross-Appellants,
versus
TENNESSEE VALLEY AUTHORITY et al., Cross-Appellees

Appeals and Cross-Appeal from the District Court of the United States for the Northern District of Alabama

(July 17, 1935)

Before Bryan, Foster and Sibley, Circuit Judges

BRYAN, Circuit Judge:

By contract dated January 4, 1934, the Alabama Power Company, a corporation engaged in the manufacture, trans-

[fol. 1307] mission, and distribution of electricity, agreed to sell such of its transmission lines as extend from Wilson Dam at the Muscle Shoals plant in Alabama into seven Alabama counties, to the Tennessee Valley Authority (TVA), a corporate agency of the United States, created by the Act of Congress of May 18, 1933, 48 Stat. 58; 16 U. S. C. A., § 831, et seq. The TVA agreed to pay the purchase price of $1,150,000 upon delivery. The Alabama Power Co. further agreed that it would offer its distribution systems within the territory above named for sale to the respective municipalities in which such systems are located at prices which it was willing to accept; and that it would co-operate with the Electric Home & Farm Authority (EHFA), a Government corporate agency created to finance sales of electrical appliances, in the sale of such appliances. The TVA, after waiting three months for the negotiation and consummation of sales of the urban distribution systems, was to have the right to furnish electric power to any and all such systems regardless of whether the Alabama Power Co. had sold them to the municipalities. On May 21, 1934, the Alabama Power Co. entered into an agreement with EHFA to act as the latter's agent in the collection of installments due on the purchase price of electrical appliances sold by retailers to individual customers. On August 9, 1934, the Alabama Power Co., not having sold any of its distribution systems to the municipalities, granted to TVA an option to purchase them; but on January 25, 1935, after this suit was filed, TVA gave notice that it had elected not to exercise that option.

On September 13, 1934, this suit to enjoin performance of the above mentioned contracts was brought by a minority of the preferred stockholders of the Alabama Power Co., after they had formally but unsuccessfully demanded that the company itself institute suit to rescind those contracts.

[fol. 1308] The decree of the district court, entered after final hearing, adjudged the contracts of January 4, and May 21 to be in furtherance of illegal proprietary operations by TVA, and ordered them annulled. It enjoined 17 municipal defendants, which were under contract to receive electric power from TVA for use in the area served by the Alabama Power Co., from accepting or expending

federal funds for the construction of city electric light plants, holding that these contracts were entered into in aid of TVA's illegal proprietary operations; and further enjoined them and the remaining municipal defendant, the City of Athens, which owns its distribution system, from purchasing electric power from TVA, on the ground that TVA was engaged in illegal competition with the Alabama Power Co. The TVA, EHFA, and City of Florence appeal from the decree. The plaintiffs below have taken a cross-appeal, contending that the decree should have included a declaratory judgment in order to prevent TVA from attempting to renew the option contract of August 9, which it is said was not exercised because of the pendency of this suit, or from engaging in divers other illegal operations not specifically enjoined.

The district judge made the following, among other, findings of fact:

The United States acquired the Muscle Shoals property on the Tennessee River and built thereon Wilson Dam, an auxiliary steam plant, and two nitrate plants, for war purposes. The existence of these facilities for the manufacture of war materials constitutes a valuable national asset. Wilson Dam unaided by other power development, with its eight hydro-electric generators installed by the War Department, is capable of producing 50,000 k.w. continuously, except during low stages of water; and the steam plant has a continuous capacity of 60,000 k.w. In 1934 68% of the power generated at Wilson Dam was used for governmental purposes. Other dams under construction, [fol. 1309] which like Wilson are of the high-dam type, are, upstream, the Norris and the Wheeler; and, downstream, the Pickwick. The release of waters from Norris Dam will increase the continuous capacity of Wilson Dam by 40,000 k.w., and Norris Dam itself, if generators are installed, is capable of producing 73,000 k.w. If the Wheeler and the Pickwick Dams are used only as reservoirs, according to present plans, the total continuous capacity of Wilson and Norris Dams in combination, without the aid of the steam plant, will be 202,000 k.w. The construction of Wilson Dam also provides a depth of 9 feet of slack water over the Muscle Shoals rapids, thereby eliminating a serious obstruction to navigation. Navigation will be further improved by the completion of Wheeler and Pickwick Dams.

Storage of water by means of reservoirs is essential to adequate flood control on the Tennessee River. Wilson Dam was completed in 1925 at a cost of fifty million dollars. It probably is not capable of producing more water power than would be needed for the national defense in time of war, but in time of peace the power it makes available is so much in excess of the Government's needs for it for national defense and for navigation that, without the installation of any other dam, there is a surplus even after supplying the transmission lines which TVA agreed to purchase from the Alabama Power Co. There has been no sale or contract for sale of the remaining surplus. The sale of electric energy generated at Muscle Shoals in excess of that required for operating the locks and servicing Government properties can be made to produce profits which could be applied toward the reimbursement of the cost of Wilson Dam, or expended in the construction of new dams. It is not the purpose of TVA to limit the production of electric power to that needed by the Government in manufacturing war materials and providing for navigation, but its declared policy is to utilize to the fullest extent possible [fol. 1310] all the electric energy which the Wilson and other dams are capable of producing, by supplying first governmental needs, and then by selling the surplus to users of electricity, in competition with public utility corporations engaged in the manufacture, transmission, and distribution of electricity. In disposing of surplus power TVA intends to obtain revenue, but at the same time to undersell its private competitors in order to establish a "power yardstick" and to demonstrate the advantages of public over private ownership of electric light plants. Upon these findings of fact, which may safely be assumed to be correct since none of them is challenged, the district judge concluded as a matter of law that the Congress has no constitutional power to confer upon TVA, or any federal agency, the right to enter into such a contract as that of January 4, and that the contract of January 4, since it was void as to TVA, was void as to the Alabama Power Co. The district judge, having reached this conclusion, consistently held that the dependent contract of May 21 was also void. The plaintiff stockholders may be dismissed from further consideration, inasmuch as they are entitled to assert only the rights of the Alabama Power Co.; and so

we need to consider only the effect of the principal contract of January 4 upon the rights of the contracting parties. The district judge, having held that TVA was assuming to exercise authority which no act of Congress could constitutionally confer upon it, did not pass upon the contention made on behalf of the Alabama Power Co. that the TVA Act of 1933 was invalid on the ground that it purports to delegate legislative authority. It was the view of the district judge that TVA, while it had the implied right to dispose of any surplus electric power unintentionally created in the exercise of a bona fide effort to make such power only as was needed for the manufacture of war materials and for serving the necessities of navigation, had and could [fol. 1311] have no constitutional authority intentionally to create and sell any additional surplus. He therefore enjoined further performance of the contract of January 4, not for any inherent infirmity, such as fraud, duress or inadequate consideration, but solely because he was convinced that the program of TVA for the manufacture and disposal of surplus electric power bore no substantial relation to any lawful governmental function. It is the contention of TVA that as an agency of the United States it has the constitutional right and statutory authority to dispose of all the electric power, in excess of such of it as may be needed from time to time for the production of war materials and for purposes of navigation, that the Wilson Dam operated to its full capacity can be made to produce.

Wilson Dam is the property of the United States. It was constructed by authority of § 124 of the National Defense Act of 1916, 38 Stat. 215, for the purposes of supplying water power for the production of munitions of war and improving navigation on the Tennessee River. The right to erect and maintain it, in the exercise by Congress of the war and commerce powers conferred upon it by the Constitution, is so clear that it is conceded. The Government by virtue of its lawful ownership of Wilson Dam owns also the water power inevitably created by the construction of that dam. Kaukauna Co. v. Green Bay &c. Co., 142 U. S. 254; Green Bay &c. Co. v. Patten Paper Co., 172 U. S. 58; United States v. Chandler-Dunbar Co., 229 U. S. 53. Congress, in the exercise of its power, under Art. IV, § 3, cl. 2, of the Constitution, to dispose of property belonging to the United States, may dispose of water power created

at Wilson Dam as freely as it may of any other Government property. It never heretofore has been held that the right of disposal exists only as to such part as is accidentally produced in excess of the amount strictly necessary for purposes of national defense or of navi- [fol. 1312] gation; but always that right has been supposed to extend to all the excess or surplus. Water power is property sui generis; unlike most other forms of property it cannot be put away and kept for future use or sale, but it must be either converted into electricity and used up as it is released from storage or allowed to go to waste. If the water stored at Wilson Dam is permitted to pass through the penstocks, in the language of counsel for TVA, "there is gold in it," but if allowed to flow unhindered over the dam "it is forever gone." As a practical matter there would be no market for the incidental or accidental surplus created in the honest effort to produce only enough electricity to supply strictly governmental requirements; for no user, public or private, of electricity would become a customer unless assurance could be given of a firm and dependable supply. That the surplus or any of it need not be allowed to go to waste, but that it and all of it may rightfully be disposed of and the proceeds applied toward reimbursement of the cost of a publicly-owned dam is well settled. Kaukauna Co. v. Green Bay &c. Co., supra; United States v. Chandler-Dunbar Co., supra; Arizona v. California, 283 U. S. 423. In the last cited case at page 455 it is said: "As the river is navigable and the means which the Act provides are not unrelated to the control of navigation, * * * the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress." And so here, in our opinion it cannot successfully be maintained that there is no reasonable or substantial relation between the production and disposal of the surplus hydro-electric power available at Wilson Dam and the exercise of the war and commerce powers conferred upon Congress. It is within the province of Congress to adopt any reasonable means, whether of lease or sale, for disposing of the surplus. The use of transmission lines to facilitate sales cannot fairly be said by the courts to be unreasonable or inappropriate. Of course it is true that the Government of the United States cannot en- [fol. 1313] gage at will in private business, but it by no

means follows that it cannot sell property which it owns, even though in doing so it may enter into competition with other public or private owners of property. It is not doubted that each of the several states holds in perpetual public trust dominion over the navigable waterways within its borders; but it is equally true that the rights of the states in navigable waters are subject to the supreme war and commerce powers of the general government. We live under a dual government of divided powers, not under two separate governments of conflicting powers. The power over navigable waters granted to the federal government is not in conflict with but is necessarily superior to the dominion over such waters which the states reserved to themselves. Gibbons v. Ogden, 9 Wheat. 1. It leads nowhere to say that the federal government in exercising its constitutional powers acts within "State domain," since at the same time it is acting within its own domain as well. We conclude that the decree below cannot be sustained on the theory of a lack of constitutional power.

The inquiry remains whether the necessary statutory power has been conferred on the TVA. The Tennessee Valley Authority Act of 1933 was passed for the purposes, among others, "of maintaining and operating properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense, * * * to improve navigation in the Tennessee River and to control destructive flood waters in the Tennessee River and Mississippi River Basins." The Act purports in separate sections to confer on TVA the power to construct dams, reservoirs, and transmission lines, to furnish nitrogen products for military purposes; to allot to the War Department the water power necessary to operate locks, lifts, or other facilities in aid of navigation, and to [fol. 1314] produce, distribute, and sell electric power, "as herein particularly specified." The "particular specifications" are to sell the surplus power not used in the operation of locks and other works to states, counties, municipalities, partnerships, or individuals. The Act further provides for the construction of Norris Dam, and that the President may from time to time recommend to Congress such legislation as he deems proper for flood control, navigation purposes, generation of electric power consistent with flood control and navigation, the proper use of marginal lands,

ıe proper method of reforestation in the drainage basin, nd the economic and social well-being of the people living ı the Tennessee River Basin. The right was reserved to ıe Government, in case of war or national emergency declared by Congress, to take possession of all or any part of he property described or referred to in the Act "for the ıurpose of manufacturing explosives or for other war purıoses." The sections of the Act are declared to be separaıle, to the end that the unconstitutionality of any one section may not affect the validity of any other.

The Act is unobjectionable from a constitutional standıoint insofar as it undertakes to confer on TVA the power o take charge of and operate Wilson Dam, and to distribute ınd sell surplus electricity to municipalities as well as to ıtility companies. "And the fact that purposes other than ıavigation [and national defense] will also be served could ıot invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power." Arizona v. California, supra. It does not appear that TVA in respect of its operations at Wilson Dam is doing or proposes to do anything more than is authorized by the Act. This being so, its motives are immaterial. The section of the Act which provides that the President shall make recommendations to Congress as to the future policy of developing the Tennes-[fol. 1315] see Valley is unobjectionable, as in any event the President may make such recommendations to Congress as he thinks proper. The Act is not subject to the criticism that Congress has abandoned all purposes of navigation and national defense, since navigation is now being improved, and in the event of war the right is reserved to use the Muscle Shoals property exclusively for national defense.

The Rivers and Harbors Act of 1930, 46 Stat. 927, authorized a project for the permanent improvement of the main stream of the Tennessee River to a navigable depth of nine feet in accordance with the recommendation of the Chief of Engineers in House Document No. 328, of the Seventy-first Congress, second session. Because there was no recommendation in that House document for high-type dams, or for their location, it is contended that the Tennessee Valley Authority Act undertakes to delegate legislative power with reference to the location and type of the Norris, Wheeler and Pickwick Dams. As we have just seen, the

Act itself provides for the location of Norris Dam, but whether specifically enough as to type is as we think immaterial; for Wilson Dam alone, without any assistance from Norris, Wheeler or Pickwick Dam, has a surplus after serving the transmission lines which it agreed to purchase from the Alabama Power Co. Besides, the Alabama Power Co. has no standing to object even though these additional dams have not been properly authorized by Congress. Frothingham v. Mellon, 262 U. S. 477. It is not a riparian owner, or the owner of a dam site which the Government is assuming to take; nor has it any such special interest as would entitle it to object to proposed improvements in aid of the national defense or of navigation. United States v. Chandler-Dunbar Co., supra, at page 73.

On the whole case, our conclusion is that the decree of [fol. 1316] the district judge was erroneous. We therefore have no occasion to consider whether the Alabama Power Co., if that decree had been affirmed, would have been entitled to a declaratory judgment.

Appellees take nothing by their cross-appeal. On the direct appeal the decree is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

SIBLEY, Circuit Judge, concurring:

The District Judge also found that the TVA Board had very far-reaching plans for social experimentation which he thought beyond the constitutional limits of the federal power. This case is not to be decided by the purposes and plans of the Board, but by the validity of what is about to be done under the attacked contracts. The contracts deal only with surplus power arising at the Wilson Dam which may, as we hold, be disposed of by Congress. The manner of the disposal of public property and the extent to which it may be allowed to affect private business are within the discretion of Congress. An exercise of legislative discretion is reviewable at the ballot box rather than in the courts.

[fol. 1317] Judgment

Extract from the Minutes of July 17th, 1935

No. 7764

TENNESSEE VALLEY AUTHORITY et al.

versus

GEORGE ASHWANDER et al.

No. 7812

GEORGE ASHWANDER et al.

versus

TENNESSEE VALLEY AUTHORITY ET AL.

These causes came on to be heard on the transcripts of the record from the District Court of the United States for the Northern District of Alabama, and were argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court on the direct appeal be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered, adjudged and decreed by this Court, that appellees take nothing by their cross-appeal.

Sibley, Circuit Judge, concurring.

[fol. 1318] MOTION AND ORDER STAYING MANDATE—Filed August 2, 1935

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 7764

TENNESSEE VALLEY AUTHORITY et al., Appellants,

vs.

GEORGE ASHWANDER et al., Appellees

No. 7812

GEORGE ASHWANDER et al., Cross-Appellants,

vs.

TENNESSEE VALLEY AUTHORITY et al., Cross-Appellees

MOTION FOR STAY OF MANDATE

Now come George Ashwander et al., appellees in No. 7764 and cross-appellants in No. 7812, and show to the Court that a petition for certiorari to the Supreme Court of the United States, seeking review of the judgment of this Court entered on July 17, 1935, is being prepared by counsel on their behalf and will be filed within the time allowed by law.

Wherefore, movants pray that the mandate of this Court be stayed and withheld until October 17, 1935, the expiration of the time allowed by law for filing said petition, or for such time as the Court may deem reasonable, pending the filing on behalf of movants of said petition in the Supreme Court of the United States, and that upon the filing of said petition for certiorari said mandate be stayed pending final determination of the cause or of said petition for certiorari by the Supreme Court.

(Signed) Forney Johnston, (Signed) Jos. F. Johnston, Attorneys for George Ashwander et al.

[fol. 1319] ORDER

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

Nos. 7764 and 7812

TENNESSEE VALLEY AUTHORITY et al., Appellants,

versus

GEORGE ASHWANDER et al., Appellees

GEORGE ASHWANDER et al., Cross-Appellants,

versus

TENNESSEE VALLEY AUTHORITY et al., Cross-Appellees

On consideration of the application of the appellees and cross-appellants in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellees and cross-appellants, to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 2nd day of August, 1935.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 1320] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 1305 to 1319, next preceding this certificate contain full, true and complete copies of all the pleadings, recc d entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in certain causes in said Court, numbered 7764 and 7812, respectively, wherein Tennessee Valley Authority et al. are appellants and cross-appellees, and George Ashwander et al. are appellees and cross-appellants, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed records, Vols. I and II, numbered from 1 to 1304, are identical with the printed records upon which said causes were heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 5th day of August, A. D. 1935.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 1321] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 403

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1322] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 404

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.